United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7530

To be Argued by
JOHN H. CLEVELAND III

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of the Arbitration

-between-

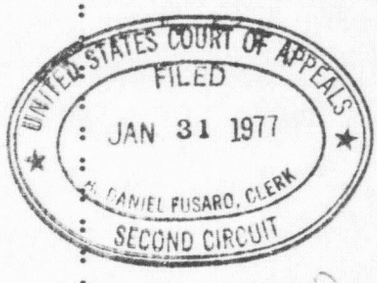
PETROLEUM TRANSPORT, LTD.
Owners of the IONIAN CHALLENGER,
Petitioner-Appellant,

-and-

YACIMENTOS PETROLIFEROS FISCALES,
Charterers,

Respondent-Appellee.

DOCKET NO.
76-7530



BRIEF FOR APPELLEE

(On Appeal from the United States District
Court for the Southern District of New York)

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UNITED STATES COURT OF APPEALS
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In the Matter of the Arbitration -between- PETROLEUM TRANSPORT, LTD. Owners of the IONIAN CHALLENGER, Petitioner-Appellant, -and- YACIMENTOS PETROLIFEROS FISCALES, Charterers, Respondent-Appellee.	DOCKET NO. 76-7530

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ISSUE PRESENTED

WHETHER THE COURT BELOW ERRED IN HOLDING, IN THE EXERCISE OF ITS DISCRETION, THAT THE APPELLANT HAD FAILED TO MAKE A SHOWING OF MISCONDUCT OR EXCEEDING OF THEIR POWERS ON THE PART OF THE ARBITRATORS UNDER THE UNITED STATES ARBITRATION ACT, 9 U.S.C. §10(c) and (d).

STATEMENT OF THE CASE

Respondent-Appellee, Yacimentos Petroliferos Fiscales (hereinafter "YPF") adopts the Statement of the Case as set out in the brief of Petitioner-Appellant, Petroleum Transport, Ltd. (hereinafter "Petroleum").

THE FACTS

The relevant facts are set out fully in the papers filed in opposition to Petroleum's petition below, more particularly in the affidavit of George C. Pendleton dated May 12, 1976, and in the Opinion of the Court below, Hon. Charles H. Tenney, Judge (App., pp. 9, et seq.*).

They are summarized here.

Petroleum was the owner of the vessel "Ionian Challenger," chartered to YPF pursuant to an unsigned Charter Party containing a New York arbitration clause. Immediately

*Such references are to the Appendix filed with Appellant's brief

after the vessel's fixture, on or about September 4, 1973, disputes arose between the parties and each duly nominated an arbitrator.

The arbitrators nominated by the parties duly selected a Chairman and hearings were held on December 16, 1974, and February 3, 1975. At the outset of the first hearing the Chairman announced:

> There has been a procedure established recently, whereby after the arbitrators have made their determination of their opinion, that they notify the parties that it is ready for release and on receipt of the fees and expenses they will be released. Is that a pattern that is suitable for you? [emphasis added]

Counsel for both parties agreed. It was further agreed that the proceedings would be conducted pursuant to the "Maritime Arbitration Rules of the Society of Maritime Arbitrators, Inc." (hereinafter "S.M.A. Rules").

During the hearings, counsel for both parties submitted their respective exhibits and memoranda. In YPF's behalf evidence was presented as to the rates at which it subsequently chartered other ships. Petroleum had the opportunity to present evidence on rates, but neglected to do so until it later sought to reopen the hearings.

At the conclusion of the hearing of February 3, 1975, the Chairman stated on the record:

> Both parties having stated that they have no further evidence to submit, other than that which will be forthcoming by mail and will not be a part of the transcript, this hearing is closed at approximately 4:35 p.m. on the 3rd of February.

A schedule for briefing was agreed and on March 11, 1975, counsel for YPF wrote to the arbitrators stating that he had nothing to file in rebuttal and, therefore, considered the record closed and submitted for decision. (App., p. 16) Subsequently, owing to the illness of Petroleum's counsel, the time for filing briefs was extended.

Petroleum's post-hearing memorandum was filed on or about July 2, 1975. No reply memorandum was filed on behalf of YPF.

Counsel were advised by the Panel two and one-half months later, on September 17, 1975, that the Panel intended to make its award without considering any additional submissions by the parties unless those submissions were received by September 27, 1975. YPF's and Petroleum's submissions were filed, respectively, on September 22nd and September 24, 1975.

As found by the Court below (App., p. 12), Petroleum's counsel stated, inter alia, in his letter of September 24, 1975, to the Panel:

> We also note that the Panel will proceed to make an award on or shortly after September 27th. We assume that the Panel does not therefore intend to call any broker * * *. While we are pleased that the panel is proceeding to an award promptly * * * we had also considered calling tanker brokers * * *. Our only purpose in doing so, however, was to establish the market rate at the time. However, we agree that there appears to be no need to call any broker for the purpose * * *. [Emphasis added]

On October 10, 1975, the Chairman of the Panel wrote to counsel for both parties stating, inter alia:

> The Panel has made its determination in this case and is prepared to submit its award.
>
> The Award will be released upon receipt of arbitrators' fees which have been assessed at $2,500 per arbitrator totalling $7,500 payable by YPF.

The award was signed and dated as of October 24, 1975.

Subsequently, on November 3, 1975, counsel for Petroleum requested the reopening of the hearings for the purpose of presenting additional evidence. That request, objected to in writing the same day by YPF's counsel (App. p. 21), was the subject of correspondence and telephone discussions among counsel and the Chairman of the Panel. On November 24, 1975, the Chairman wrote to counsel for both parties advising, inter alia, that the Panel was undecided as to its power to reopen the hearings and stating that it would accept memoranda of law on the question. (App., p. 22) That

letter crossed in the mails YPF's counsel's letters of November 24, 1975, with which he had forwarded checks covering the arbitrators' fees, payable by YPF, to each of the arbitrators. The receipt of the fees was acknowledged and the award, "made" on or before October 10, 1975, was mailed to counsel for both parties.

Petroleum, nevertheless, later proffered its "Supplemental Memorandum of Law" on the question of reopening the hearings.

There were further communications among counsel for both parties and the Chairman of the Panel, culminating in the Chairman's letter to counsel dated January 6, 1976. (App., p. 24).

In that letter, the Chairman of the Panel acknowledged receipt of:

> * * * various communications from both Counsel including Mr. Cardillo's Supplemental Memorandum of Law dated 11 December 1975, contents of all of which have been noted. [Emphasis added]

The Chairman also stated:

> In view of documentation received prior and subsequent to the signing and delivery of the award and payment of the arbitrators' fees, it is the considered opinion of the Panel that its decision functions have terminated on the issues as submitted.

The Chairman went on to offer to re-convene the Panel should any dispute arise as to the quantum of the attorneys' fees that it had awarded. The Chairman's offer to re-convene was limited to this issue. It was also stated that the decision of the Panel on the matters covered in the Chairman's letter of January 6, 1976 was unanimous.

No evidence as to the amount of attorneys' fees was ever submitted.

ARGUMENT

As was recognized by the Court below, the power of the Arbitrators to act under the original submission terminated upon the "making of the award." Judge Tenney refers in his opinion (App., p. 130) to the Arbitrators' uncertainty about their powers "after the award had been made although not delivered." [Emphasis added]

Petroleum repeats on this appeal its chief contention made below that it was denied an opportunity to present evidence.

The record shows that that contention is wrong, but, more importantly here, it is irrelevant. The Court below, exercising its discretion under the United States Arbitration Act, 9 U.S.C. §10, decided that Petroleum had not made a showing either that the Arbitrators had been "guilty of misconduct," under §10(c), or that they had failed to render "a mutual, final and definite award," under §10(d).

That exercise of discretion should not be nullified here.

After an examination of all of the papers before it, the court below held:

> The arbitrators were well within their rights in rendering the award over eight months after the hearing was initially closed and after Petroleum had had ample opportunity to submit further documentation prior to the award. [Emphasis added] (App., p. 14)

That holding disposes of both of Petroleum's points of argument.

The parties agreed that the arbitration would be governed by the S.M.A. Rules, Section 30 of which, quoted in pertinent part at page 10 of Petroleum's brief, provides, inter alia:

> The hearings may be reopened by the Arbitrator(s) on his own motion or upon application of a party for good cause shown at any time before the award is made. [Emphasis added]

No provision of the S.M.A. Rules requires, or even suggests, that any award be "delivered" as a prerequisite to its being considered to have been "made." Thus, under the rules of common English usage, and according to the plain meaning of the words, an award is "made" when the arbitrators have reached a decision. Prior to their having reached their decision there is no award; at the moment their decision is

reached the award comes into existence and can be said to have been "made." As Section 36 of the S.M.A. Rules refers to "delivery of the award," and as it must be accepted that the award must have come into existence at some prior time in order to be capable of being delivered, delivery cannot be a prerequisite to the award's being "made."

Most significantly, however, the parties had agreed at the outset that the award's delivery would await the payment of the fees of the Arbitrators after the award was made and was "ready for release."

In any event, the award was "made" on October 10, 1975, and the Arbitrators then became functus officio. See generally, Domke on Commercial Arbitration §22.01. "Functus Officio Concept," and authorities cited thereat.

Petroleum's application to reopen the hearings came after the award had been made, and was not supported by a showing of "good cause," as required by Section 30 of the S.M.A. Rules. Thus, the Arbitrators were acting within the Rules prescribed in refusing to hear additional evidence. They cannot be said to have been guilty of mis-conduct.

Petroleum also urged below that the award be set aside on the ground that the arbitrators so imperfectly executed their powers that a mutual, final and definite award had not been made.

Judge Tenney recognized and held that the award made by the Arbitrators was based on all of the evidence properly submitted, and only after Petroleum was several times given the opportunity to offer additional evidence.

Assuming, arguendo, that the award had not been made prior to Petroleum's application for a reopening of the hearings, it must be inferred that the Arbitrators decided, pursuant to Section 30 of the S.M.A. Rules, that Petroleum did not support its application by a showing of good cause. Petroleum allegedly sought reopening to offer evidence on charter rates. It knew from the outset that evidence of such prices was or might be relevant; indeed, YPF submitted evidence on the subject. However, Petroleum did not raise the point for more than eight months after the record had been closed and after the Arbitrators had decided not to seek similar evidence on their own initiative.

The first two paragraphs of the Chairman's letter of January 6, 1976 (App., p. 24) make it plain that the Arbitrators had considered Petroleum's application to reopen, including the Supplemental Memorandum of Law in support thereof, before deciding that the hearings would not be reopened. The Chairman specifically stated that the Arbitrators had noted "documentation received prior and subsequent to the signing and delivery of the award * * *.

In view of the Panel's having lost its power to act further, the offer of the Chairman to re-convene the Panel in the event of a dispute over the amount of attorneys' fees to be assessed can only be viewed as an offer to accommodate the parties should they both agree to submit that narrow dispute for settlement.

Although Petroleum had the opportunity during the hearings as well as during the period of more than eight months thereafter, it did not offer any evidence as to the amount of its attorneys's fees, nor did it reserve its right to prove, after the award was made, the quantum of any attorneys' fees that might be awarded.

The Arbitrators cannot be said to have imperfectly executed their powers solely because they failed to make a quantum finding upon an issue with respect to which there was no evidence before them (See paragraph 3 of the Chairman's letter of January 6, 1976. App., p. 24)

Petroleum places great reliance on Cofinco, Inc. v. Bakrie & Bros. M. V., 395 F. Supp. 613 (S.D.N.Y. 1975), which is entirely inapposite.

In Cofinco, the dispute that had arisen between coffee merchants was nominally arbitrable under the rules of the Green Coffee Association. Those rules provided for

appellate procedure in certain cases. At the first level before three arbitrators, the defendant raised time bar and another threshold issue as complete defenses. The panel agreed, adjourned the hearing without taking evidence on the merits and held itself ready to hear further evidence in the event that it should be overruled on the threshold determinations by the five-member appellate panel.

The appellate panel reversed the panel below on the procedural issues, but then instead of remanding, issued what purported to be a final award on the merits without hearing further evidence (or any evidence). For a final twist, it awarded various "accrued expenses" without setting forth their quantum.

Judge Frankel confirmed the "final" award to the extent that it reversed the panel below on the threshold issues and remanded the matter to the panel below to resolve "the questions of fact and law on the merits that have not thus far been fairly heard anywhere," including the amount of damages. The Court held that the appellate panel's breach of the rules under which it sat amounted to "mis-conduct" under §10(c) of the Arbitration Act and that their failure to quantify the damages amounted to "imperfect" execution of their powers under §10(d). The Court recognized that the panel had not specifically "refused" to hear evidence, but

that the result was the same as the petitioner had never had an opportunity to present any evidence on the merits.

The word "opportunity" distinguishes Cofinco completely and shows that that case is controlling authority against this appeal. Here, there is ample proof (the correspondence among counsel and the Panel) that Petroleum had ample opportunity to present whatever evidence it wanted on damages. Indeed, evidence of the sort Petroleum sought reopening to present had been put into the record by YPF. Counsel for Petroleum opted not to present any such evidence.

Here, as in Cofinco, the panel did not award attorneys' fees in a specific amount. But, no proof on that issue was offered, despite the opportunity to do so.

The first sentence of Judge Frankel's discussion of the controlling law, Cofinco, supra, at 615, repeats the well-known lesson that "governing law is familiar and profoundly favorable to the arbitral process." It is submitted that Judge Tenney was right in holding that Petroleum had not made the showing required to bring this case into the class of awards described by Judge Frankel (Ibid.) as "a miniscule proportion of awards [that are] vulnerable in court."

The law is plain and firmly established that as a court will not review an award of arbitrators on the merits neither will it vacate an award to allow a party to offer additional evidence, particularly where there was ample

opportunity to present that evidence before the record before arbitrators was closed. Shopping Cart, Inc. v. Amalgamated Food Employees Local 196, 305 F. Supp. 1221 (E.D. Pa 1972).

> In [Shopping Cart] the arbitrator refused to reopen the hearing to allow the employer to present evidence from a handwriting expert to support its claim that the discharged employee had falsified reports and stolen cash. It was held that the arbitrator's action did not deny the employer a fair hearing, because the employer had a full opportunity to present evidence at the hearing, the employer knew or should have known that expert testimony would be relevant, the employer sought no continuance of the hearing, and no proffer was made of what the testimony would show. Local Union No., 251 v. Narragansett Improvement Co., 503 F. 2d 309, 312 (3d Cir. 1967), explaining, approvingly, the holding in Shopping Cart, supra.

In summary, Petroleum had ample opportunity to present evidence on whatever subject counsel believed important to its submission before the Arbitrators. Counsel rested Petroleum's case and specifically declined the opportunity to offer further evidence until after the award had been made by the Arbitrators, when they were without power to entertain further submissions.

Judge Tenney quite properly exercised his discretion --after examining all of the evidence before him--and denied Petroleum's petition. That exercise of discretion should not be disturbed or altered here.

CONCLUSION

It is respectfully submitted that the Order of the United States District Court for the Southern District of New York, Hon. Charles H. Tenney, Judge, denying the petition of Appellant in all respects, with costs to Appellee, should be affirmed, with costs in this Court to Appellee.

Dated: New York, New York
January 31, 1977

Respectfully submitted

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